STATE OF MICHIGAN

SUPREME COURT OF MICHIGAN

TERRY E. THOMAS,
Plaintiff,

Supreme Court No. 126609

vs.

GRAND TRUNK WESTERN RAILROAD INC., a successor by assignment to GRAND TRUNK WESTERN RAILROAD COMPANY, a corporation,
Defendant.

Court of Appeals Case No. 244246
Lower Court: Wayne County
Lower Court Case No. 98-839019-NO
Lower Court Hon. John A. Murphy

GRAND TRUNK WESTERN RAILROAD, INC.,
Plaintiff/Appellee,

vs.

AUTO WAREHOUSING COMPANY,
Defendant/Appellant.

Lower Court: Wayne County
Lower Court Case No. 00-17068 CK
Lower Court Hon. John A. Murphy

126609

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SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT AUTO WAREHOUSING COMPANY'S APPLICATION FOR LEAVE TO APPEAL

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Court Rules

This Supplement Brief in Support of Defendant Auto Warehousing Company's Application for Leave to Appeal is submitted pursuant to this Court's Order dated March 11, 2005 to address the following issue:

> **Whether, as contended by the dissenting judge in the Court of Appeals, defendant was entitled to have the trier of fact determine the reasonableness of the settlement amount allocated to each claim of injury.**

Simply put, this issue must be answered in the affirmative to avoid parties manipulating the financial consequences of a settlement to their advantage at the expense of the public policies adopted in this state. This Court has established that the relief granted Plaintiff, summary disposition, is only appropriate when reasonable minds cannot differ on **any** issue that is material to the matter. This Court has held that the issue of reasonableness is a question of fact to be resolved by the trier of fact rather than as an issue of law. This Court has also reversed lower courts when factual issues were not properly presented to the trier of fact for resolution. Michigan courts have reversed the allocation of settlement proceeds when, like in the instant matter, the allocation is inexplicably slanted in one direction for a particular party's benefit. Lastly, Michigan has adopted a comparative fault framework that is intended to permit the jury to allocate damages to the party responsible for those damages. Permitting Plaintiff to place over 85% of the settlement amount in this matter on the indemnified claim violates all of the foregoing principles.

The instant matter relates to Plaintiff-Appellee's (Plaintiff) settlement of two claims asserted by the underlying plaintiff, Terry Thomas, for injuries he suffered while employed by Defendant. The first injury occurred in 1997 and the second in 1999. The parties agree that Plaintiff has no claim for indemnity regarding the 1997 injury, therefore, Defendant's obligation to indemnify Plaintiff extends only to injuries suffered as a result of the 1999 incident. Plaintiff agreed to resolve

both claims with Mr. Thomas for a total amount of $725,000. Plaintiff allocated $625,000 of the settlement amount to the second incident for which it claimed indemnity and only $100,000 to the first incident for which it would be financially responsible.

The trial court determined that factual issues regarding Defendant's obligation to indemnify Plaintiff existed but that those issues and the reasonableness of the allocation of the settlement could not be presented to the trier of fact because Defendant refused Plaintiff's tender of defense (Defendant's Application for Leave to Appeal (Defendant's Application) Exhibit H). The trial court has never considered nor made a ruling regarding Plaintiff's allocation of the settlement. After reversing the basis for the trial court's grant of summary disposition, the court of appeals ignored the trial court's finding that questions of fact existed and upheld the grant of summary disposition based on Plaintiff's evidence that the settlement amount was reasonable. **The reasonableness of the allocation was never addressed by trial court.** The court of appeals stated that "[a]lthough defendant argues a contrary view of allocation based on the nature of Thomas' injuries, defendant's arguments do not raise a triable issue of fact whether the settlement was reasonable." (Defendant's Application, Exhibit J, p. 9).

Trim v Clark Equipment Co., 87 Mich App 270, 274 NW2d 33 (1978) pointed out that "the ultimate burden of persuasion remains with the indemnitee to show that the settlement was reasonable under all the circumstances." Id. at 277. In addition, Plaintiff's motion was brought pursuant to MCR 2.116(C)(10). Accordingly, Plaintiff is only entitled to summary disposition if it demonstrates that there is no genuine issue of material fact when the proffered evidence is viewed in light most favorable to Defendant. Maiden v Rozwood, 461 Mich 109, 118; 597 NW 2d 817 (1999). "A genuine issue of material fact exists when the record, giving the benefit of reasonable

doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." West v. General Motors Corporation, 469 Mich 177, 183; 665 NW2d 468 (2003). In this case, the record includes testimony of Mr. Thomas' treating physicians regarding the severity of his injuries that must be viewed in light most favorable to Defendant. As set forth more fully in Defendant's Application for Leave to Appeal, the 1997 incident caused a knee injury that has required two surgeries, causes constant pain, and would have disabled Mr. Thomas from his job, while the 1999 incident caused a knee injury that required a single procedure from which Mr. Thomas progressed well. With regard to Mr. Thomas' shoulders, the 1997 incident resulted in two surgeries to treat bone spurs and torn muscles while the 1999 incident required only one procedure and would have allowed Mr. Thomas to return to work without restriction by April 2000. Based on the testimony of Mr. Thomas' doctors, reasonable minds could find that the injuries suffered in the 1997 were more severe than the injuries in the 1999 incident thereby raising a factual issue regarding the allocation of $625,000 to the less severe injuries that precludes the grant of summary disposition. Given that the case was decided under MCR 2.116(C)(10), the testimony regarding Mr. Thomas' injuries must be viewed in a light most favorable to Defendant. Reasonable minds unquestionably could find that the less severe injuries from 1999 resulted in less damage than the more severe injuries suffered in 1997, therefore, the record presents a material question of fact making summary disposition improper. Furthermore, consideration must be given to the fact that Plaintiff allocated over 85% of the total settlement to the claim it believed it would not have to pay because Trim requires that "all the circumstances" regarding the settlement must be reviewed to determine if the settlement was reasonable. This Court has established the rules governing a motion under MCR 2.116(C)(10) and the application of those rules to the record presented in this case requires a factual determination by a jury.

In Ferrario v Board of Education of the Escanaba Area Public Schools, 426 Mich 353, 368-369; 395 NW2d 195 (1986), this Court held that conflicting statements raised a question of fact that should have been resolved by the tenure commision, which was the trier of fact regarding a teacher's dismissal. At a minimum, this case involves conflicting statements that should be resolved by the trier of fact. Plaintiff's reliance on portions of Mr. Thomas' treating physicians' testimony to support its claim that the settlment was reasonable presents conflicting statements that raise questions of fact that have never been resolved by the trier of fact in this matter. In addition, Plaintiff's reliance on statements of the facilitator or Mr. Thomas' economic expert is improper because the facilitator's statement is inadmissible hearsay that cannot be considered pursuant to Maiden v Rozwood, supra. Similarly, the economic expert simply set forth a lost wage amount, he did not attribute any portion of that amount to the 1999 incident. When these facts are looked at in the light most favorable to Defendant, they do not support the court of appeals ruling that the settlement allocation of $625,000 to the 1999 incident is reasonable as a matter of law. More importantly, these facts in no way can be found to resolve the material issue of fact raised by the testimony of Mr. Thomas' doctors.

The test to determine whether or not a settlement was reasonable involves two inquiries. The court of appeals set forth the following passage from Trim (identified as Ford by the court of appeals):

> The reasonableness of the settlement consists of two components which are interrelated. The **fact finder** must look at the amount paid in settlement of the claim in light of the risk of exposure. The risk of exposure is the probable amount of a judgment if the original plaintiff were to prevail at trial, balanced against the possibility that the original defendant would have prevailed. If the amount of the settlement is reasonable in light of the **fact finder's analysis** of these factors, the indemnitee will have cleared this hurdle.

Trim at 278. (Citations omitted) (Emphasis added). The foregoing passage establishes that the determination regarding the reasonableness of the allocation of the settlement must be made by the fact finder, not the court of appeals. There is no basis to deprive the fact finder of its role set forth in Trim to analyze the circumstances of the settlement to determine if the settlement is reasonable. The concept that the issue of reasonableness is a question of fact is not new to this Court. This Court has previously held that reasonableness is a question of fact in cases relating to employment discrimination, Morris v Clawson Tank Company, 459 Mich 256, 274; 587 NW2d 253 (1998) ("[T]he question of reasonableness is one of fact that must take into account the particular circumstances of each case." (quoting Rasheed v Chrysler Corporation, 445 Mich 109, 129; 517 NW2d 19 (1994))); in workers' compensation cases, Pulver v Dundee Cement Company, 445 Mich 68, 79; 515 NW2d 728 (1994) ("[T]he reasonableness of an employee's actions are questions of fact."); and with regard to property rights, Unverzagt v Miller, 306 Mich 260, 266; 10 NW2d 849 (1943) (the reasonableness of the use made of an easement is a question of fact). The court of appeals has similarly held that "reasonableness is a question of fact." Bouverette v Westinghouse Electric Corporation, 245 Mich App 391, 396; 628 NW2d 86 (2001) and Dunn v Lederle Laboratories, 121 Mich App 73, 80; 328 NW2d 576 (1983). Case law has given the issue of whether or not a settlement is reasonable to the trier of fact and the issue of reasonableness has been held to be a fact question by this Court, therefore, this Court should follow its prior decisions regarding reasonableness and enable the trier of fact to make a determination regarding the reasonableness of the settlement allocation in this matter.

A remand to the trial court for a determination of whether the allocation of the settlement was reasonable, an issue that was not addressed by the trial court, is also consistent with Bosak v

Hutchinson, 422 Mich 712, 375 NW2d 333 (1985). Bosak involved an accident where the injured plaintiff lost four fingers during the assembly of a crane at the construction site. At issue was an indemnity provision between a sub-contractor, CCI, and a crane company, Hurley, hired by the subcontractor to provide and operate a crane wherein the sub-contractor would indemnify the crane company for liability arising when the crane was operational. The trial court held that the contract of indemnification was unenforceable as a matter of public policy because the plaintiff's employer, CCI, was protected from indemnification claims by the exlcusive remedy of the Workers Disability Compensation Act (WDCA). The court of appeals reversed the trial court's basis for granting summary disposition to plaintiff's employer but upheld the grant of summary disposition based on the argument that the crane was not operational at the time of the incident. In response to the court of appeals holding, this Court stated:

> [W]e are not persuaded that the Court of Appeals could properly pass on the mixed question of law and fact, inasmuch as the trial court had not considered the question whether the crane was in operation at the time of the accident so that the indemnity agreement was enforceable. Moreover, it is evident from the parties' briefs that the facts necessary to the determination of the issue are disputed. Therefore, we remand the case to the trial court for consideration of the issue.

Id at 751-752. The same analysis applies to the instant case. Plaintiff asserted a claim of indemnity against Defendant with regard to Mr. Thomas' 1999 incident. Defendant contested the claim for indemnity. The trial court granted summary disposition regarding Plaintiff's claim and held that Defendant could not contest the issue of indemnity nor the reasonableness of the settlement because Defendant refused Plaintiff's tender of defense regarding the incident. The court of appeals reversed the basis for trial court's ruling but upheld the grant of summary disposition based on its determination that the settlement amount was reasonable, an issue the trial court had not considered.

Moreover, the parties' briefs and the dissenting opinion in the court of appeals establish that the facts regarding plaintiff's injuries are disputed. Just as a remand to the trial court for consideration of factual issues never addressed by the trial court was proper in Bosak, a remand to the trial court to allow the trier of fact to weigh the parties conflicting evidence regarding the reasonableness of the settlement is appropriate in this matter.

Michigan courts have also remanded the allocation of a settlement with the instruction to conduct an evidentiary hearing to permit the adjustment of the allocation of a settlement. Tucker v Clare Brothers Limited, 196 Mich App 513, 493 NW2d 918 (1993), involved a third party lawsuit against a furnace manufacturer for injuries suffered when a band holding a furnace in place broke while an employee was delivering the furnace for his employer. The employee's wife also filed a claim for loss of consortium. The workers' compensation carrier advised the employee's counsel that it was asserting its lien for over $100,000 for benefits paid to the employee. The employee settled with the manufacturer for a total of $40,000. The judgment allocated $10,000 to the injured worker and $30,000 to his wife. The workers' compensation carrier objected to the entry of the judgment and requested an evidentiary hearing regarding the allocation of the settlement contending that the allocation was an attempt to circumvent the lien asserted because the award on the consortium claim was not subject to the lien. Id. at 515-516. The trial court entered the judgment and the workers' compensation carrier appealed. The appellate court held "[w]e believe the parties' settlement division does not properly represent the actual amount of damages each plaintiff would have been entitled to receive...it appears that the parties have attempted to circumvent the lien by arbitrarily determining an allocation of the settlement." Id. at 521. The court remanded the matter to the trial

court to conduct an evidentiary hearing regarding the allocation of the settlement proceeds. Id. at 522.

Defendant is requesting a remand to the trial court for proceedings regarding the allocation of the settlement proceeds for reasons similar to those relied on in Tucker. In this case, the allocation was not intended to avoid a lien, rather, it was done based on Plaintiff's claim of indemnity against Defendant to relieve Plaintiff from the bulk of the financial burden of the settlement. The intent is the same in both cases, the settling party is attempting to manipulate the impact of the settlement to its advantage at the expense of another party. No legal doctrine or theory supports the idea that inequitable and irrational allocations can be made when settling a case to benefit the settling party at the expense of others. In light of the testimony of Mr. Thomas' treating physicians regarding the severity of the injuries suffered as a result of the 1997 incident, the allocation of $625,000 out of the $725,000 settlement to the 1999 incident is an arbitrary and unjustified allocation of the settlement. Plaintiff is asking the court system to turn a blind eye to its scheme to avoid its financial obligations for the injuries Mr. Thomas suffered in 1997 and accept its unfounded allocation simply because Defendant does not dispute that the overall settlement amount was reasonable. The overall settlement amount of $40,000 in Tucker was reasonable as well, yet the court identified the unjust nature of the plaintiffs allocation and remanded the matter to require the plaintiffs to justify their allocation. Just as the remand in Tucker was necessary to permit a hearing regarding the allocation of the settlement proceeds, a remand is appropriate in this case to permit the trier of fact to determine the proper allocation of the settlement proceeds between the 1997 and 1999 incidents. While public policy in this state may encourage settlement, public policy does not support conduct that

manipulates a settlement unfairly in favor of one party and at the expense of another as Plaintiff has done here.

The fact that Mr. Thomas suffered different injuries in two separate incidents does not relieve the trier of fact from the responsiblity to allocate damages between the incidents. Brownell v Brown, 407 Mich 128, 130; 283 NW2d 502 (1979) quoted Maddux v Donaldson, 362 Mich 425, 432-433; 108 NW2d 33 (1961) for the following statement of law:

> "It is our conclusion that if there is competent testimony, adduced either by plaintiff or defendant, that the injuries are factually and medically separable, and that the liability for all such injuries and damages, or parts thereof, may be allocated with reasonable certainty to the impacts in turn, the jury will be instructed accordingly and mere difficulty in doing so will not relieve the triers of the facts of this responsibility."

While Brownell involved successive impacts in a motor vehicle accident rather than incidents that occurred over a year apart, the logic set forth above applies equally well to the instant case. This case involves competent testimony from Mr. Thomas' treating physicians that his injuries from the 1997 and 1999 incidents are factually and medically separable, therefore, it is the responsibility of the trier of fact to allocate the damages recovered, $725,000, between the two incidents.

The allocation of the damages recovered between the two incidents by the trier of fact is also consistent with Michigan jurisprudence regarding the allocation of fault between tortfeasors by the trier of fact. "This state has legislatively adopted a comparative fault system for apportioning damages awarded in personal injury, property, and wrongful death actions. The enactment of several in pari materia statutes, in particular MCL § 600.6304, MCL § 600.2957, and MCL § 600.2959, reveals a legislative intent to allocate liability according to the relative fault of all persons contributing to the accrual of a plaintiff's damages." Lamp v Reynolds, 249 Mich App 591, 596;

645 NW2d 311 (2002); see also Hill v Sacka, 256 Mich App 443, 453; 666 NW2d 154 (2003), app. den. 469 Mich 986, 674 NW2d 154 (2003). Mr. Thomas' claims regarding his 1997 and 1999 injuries were tort actions to recover damages associated with personal injuries. MCL 600.6304(1) states:

> (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:
>
> (a) The total amount of each plaintiff's damages.
>
> (b) The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under section 2925d, regardless of whether the person was or could have been named as a party to the action.

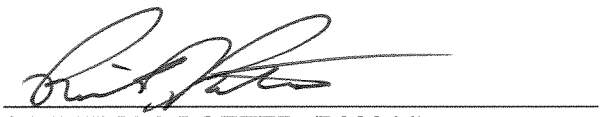
Based on Plaintiff's settlement of both of Mr. Thomas' claims, the answer to subsection (a) has been answered in the amount of $725,000. Plaintiff's arbitrary allocation of the total settlement amount has precluded the trier of fact in this case from performing the statutory obligation to determine the percentage of fault, or in this case damages, attributable to the 1997 and 1999 incidents. MCL 600.6304(4) provides that "a person shall not be required to pay damages in an amount greater than his or her percentage of fault," however, Plaintiff's actions in allocating over 85% of the settlement proceeds to the incident for which it had an indemnity claim thwarts this principle. The statutory language sets forth the Legislature's intent to have the jury allocate liability according to the relative fault of all parties contributing to the damages. Both the Plaintiff and the court of appeals in this matter have usurped the role of the jury to allocate Mr. Thomas' damages between the 1997 and 1999 incidents by resolving the factual issue of reasonableness.

Plaintiff has the burden of persuasion regarding the reasonableness of the settlement allocation. Trim, supra. Based on the record evidence from Mr. Thomas' physicians regarding the nature and extent of the injuries suffered in the two incidents, the reasonableness of the settlement presents a fact question. Resolution of the issue of reasonableness here properly rests with the fact finder in accordance with Michigan law holding that reasonableness is a question of fact. Morris, Rasheed, Pulver, and Unverzagt, supra. The requested relief is consistent with prior cases that have remanded issues regarding indemnity and the allocation of a settlement. See Bosak and Tucker, supra. The requested relief also comports with Michigan law regarding the jury's role to allocate fault for a party's injuries, Brownell, supra, and the Legislature's adoption of a comparative fault system that provides that a party shall not be required to pay damages in an amount greater than his or her percentage of fault. All of the foregoing support remanding this matter to the trial court so that fact finder can decide whether Plaintiff's arbitrary allocation for its own benefit was reasonable.

WHEREFORE, Defendant Auto Warehousing Company requests that this Court reverse the Court of Appeals' Opinion finding no triable issue of fact regarding the reasonableness of the allocation of the settlement by Plaintiff Grand Trunk Western Railroad, Inc., and remand the issue regarding the reasonableness of the settlement to the Wayne County Circuit Court for trial on that issue.

Respectfully submitted,

POTTER, DeAGOSTINO, O'DEA & PATTERSON



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